PUBLIC PROSECUTOR

v.

TAN TUAN SENG

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[CRIMINAL TRIAL NO. 47-49-90]
6 APRIL 1993

DANGEROUS DRUGS: Drugs in bag - Bag found in a car - Whether presumption under s. 37(d) Dangerous Drugs Act 1952 applies - Accused attempted to run - No knowledge of drugs.

Following certain information received, a party of police personnel staged an ambush at a Shell Station at Jalan Maharajalela, Kuala Lumpur. The accused, a "loan shark", was seen driving a car, whereupon the police party followed the accused's car. The accused stopped his car and alighted from the car. Whilst he was outside the car, the police attempted to arrest him. The accused tried to escape by running but was soon arrested. After his arrest, the police found a bag in the front passenger seat of his car. The bag contained the drugs.

The accused maintained that the bag belonged to one Johor Seng who was travelling with the accused and alighted just before the arrest. The accused attempted to run away as he thought that the police were after him in connection with his illegal moneylending business.

Held:

[1] A fair interpretation of the section is that in certain circumstances a bag may fall within the scope of the word "anything" in s. 37(d), even though it would lead to the anomalous situation where the presumption would not apply if the drugs were found just lying in the car without being contained in a bag. But it must be emphasised that for the presumption under s. 37(d) to apply, the prosecution must first prove that the accused had exclusive custody or control of the bag. The presence of a bag in a vehicle without any other evidence is insufficient to establish conclusively that the bag was in the custody and/or control of the person present in the vehicle.

[2] The accused was having custody, if not control of the bag, even though momentarily. The accused by his assent in allowing Johor Seng to leave the bag in the car, can be said to have had custody of the bag. That being the case, the presumption under s. 37(d) must apply against him.

[3] The defence story is very brief. Yet in its brevity, there was nothing improbable about it. There was no other evidence to contradict or disprove the accused's explanation that he had no knowledge of the drugs in the bag. Whilst it is true that whenever the presumption under s. 37(d) is applicable, the prosecution need not adduced direct evidence of knowledge of the drugs on the part of the accused, the Court is inclined to accept the accused's sworn testimony unless there are compelling reasons as to why it should not.

[4] Though, generally the fact of the accused running away from the police will be taken into consideration in determining the guilt of the accused, it must be stressed that no strong inference can be placed on the mere fact that an accused attempted to run away when confronted by a group of police personnel.

[Accused acquitted and discharged].

Cases referred to:

PP v. Lin Lian Chen [1992] 4 CLJ 2086 / [1993] 1 SCR 159 at p. 165 ***(foll)***
Choo Teck Soon v. PP [1954] MLJ 63 ***(cit)***
Lockyer v. Gibb [1966] 2 All ER 653 at p. 656 ***(cit)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER HL ***(cit)***
Tong Peng Hong v. PP [1955] MLJ 232 ***(foll)***
Syed Ali v. PP [1982] 1 MLJ 132 ***(cit)***
Mohd Radhi v. PP [1991] 3 CLJ 2073 / [1992] 2 SCR 145 SC ***(foll)***
Pang Chee Meng v. PP [1992] 1 CLJ 39 / [1992] 2 SCR 1 ***(cit)***
Choo Chang Teik v. PP [1991] 3 CLJ 2387 / [1992] 1 SCR 475 ***(cit)***
PP v. Salleh Saad [1983] 2 MLJ 164 ***(cit)***
PP v. Arjan Singh [1989] 1 CLJ 462 ***(cit)***
PP v. Lin Lian Chen [1990] 2 CLJ 1020 / [1991] 1 MLJ 316 HC ***(foll)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914 ***(cit)***
Shamsuddin & Anor. v. PP [1991] 3 CLJ 2414 / [1992] 1 SCR 494 ***(cit)***
Abdullah Yaacob v. PP [1991] 2 CLJ 853 / [1991] 2 MLJ 237 ***(cit)***

R v. Carr-Briant [1943] 29 Cr App R 76 ***(foll)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(foll)***
PP v. Badrulsham [1988] 2 MLJ 585 ***(cit)***
PP v. Heinrich [1987] 2 CLJ 177/[1988] 2 MLJ 594 ***(refd)***
PP v. Lim Ah Bek [1989] 2 CLJ 1090 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da) & (h), 39B(1)(a), (2)

For the Public Prosecutor - Farah Suhanah bt Ahmad Sarji, DPP
For the Accused - Shafee Abdullah; M/s. Shafee & Co.

JUDGMENT

Dr. Visu Sinnadurai J:
The accused was arrested at a car park. After his arrest, the police found in the car which he had been driving a bag containing dangerous drugs. The drugs on analysis was found to be heroin. The accused was charged with trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952, as he was said to have been found in possession of 347.79 grams of heroin. The charge read as follows:

> Bahawa kamu pada 20hb April 1990, jam lebih kurang 4.10 petang di Jalan Maharajalela, Brickfields, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu heroin, yang beratnya berjumlah 347.79 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) yang boleh dihukum di bawah s. 39B(2) Akta yang sama.

Prosecution's Case

The prosecution's case was that, following certain information received, a party of police personnel led by ASP Othman Harun staged an ambush from a Shell station at Jalan Maharajalela, Kuala Lumpur. The accused was seen driving a car, whereupon the police party in their respective vehicles followed the accused's car. The accused stopped his car and was seen alighting from the car. Whilst he was outside the car, the police attempted to arrest him. The accused tried to escape by running but was soon arrested 30 metres away. After his arrest, the police found a bag in the front passenger seat of the car. The bag contained the drugs, the possession for which he was charged.

The prosecution attempted to introduce a cautioned statement of the accused. However, after a trial-within-a-trial was conducted, this Court ruled that the cautioned statement was inadmissible on the ground that it was not voluntarily made by the accused.

Defence

The accused was a mee seller having a stall within a coffee shop in Jalan Ipoh. Besides this business, he also ran the business of being an illegal moneylender ("a loan shark"). On the day of his arrest, a person by the name of Johor Seng came to the accused's stall. Johor Seng asked the accused whether the accused would allow him to use the accused's car. Instead of allowing him to do so, the accused agreed to drive Johor Seng to an area near the Mirama Hotel. Before the accused drove Johor Seng, Johor Seng placed a green bag in the boot of the accused's car. Johor Seng sat in the front seat.

When the accused and Johor Seng arrived at the Ford Concessionaires in the vicinity of the Mirama Hotel, Johor Seng got out of the car and from the boot took out the green bag and placed it on the floor of the front passenger seat. Johor Seng then asked the accused to wait for him whilst he went to look for a friend, promising the accused that he would return soon to collect the bag. The accused then got out of the car and walked a short distance away from it. It was whilst waiting for Johor Seng to return that the police approached the accused. Out of fright, the accused attempted to run but was arrested. When taken to his car, he was asked by ASP Othman as to whom the bag belonged to. The accused replied that the bag belonged to Johor Seng and he pointed to Johor Seng who at that time was taking to a person, who was later identified by the accused as one of the police officers by the name of Michael Lim. However, within seconds Johor Seng disappeared out of sight.

The defence gave evidence to establish the fact that the accused was an illegal

moneylender (a loan shark) and that the reason as to why he attempted to run away when confronted by the police was that he thought that the police were after him in connection with his moneylending business. The defence also attempted to adduce evidence to suggest that Johor Seng was in fact working together with the police officer, Michael Lim to frame the accused. Throughout his evidence, the accused maintained that the bag containing the drugs belonged to Johor Seng.

The Issues

In cases dealing with drug trafficking, the prosecution may establish possession:

(a) by relying on the relevant statutory presumptions provided under the Dangerous Drugs Act; or
(b) if the presumptions are not applicable, by direct or circumstantial evidence.

In the present case, the prosecution has relied on the presumptions under ss. 37(d) and (da) of the Dangerous Drugs Act. The prosecution has argued that as the bag containing the drugs was found in the accused's car, he was in custody and control of it and therefore by virtue of the presumption under s. 37(d), he is deemed to be in possession of it. The issues for determination by the Court therefore are:

(i) whether the presumptions are applicable in the instant case; and
(ii) if the presumptions are applicable, whether the defence has rebutted them; or
(iii) if the presumptions are not applicable, whether there is any direct or circumstantial evidence of possession of the drugs by the accused.

The Presumptions under the Dangerous Drugs Act

I shall first consider whether any of the presumptions are applicable in the instant case.

The possible presumptions which may be applicable to establish possession in cases where drugs are found in a car or vehicle, as in the present case, are the two presumptions embodied in s. 37(d) and s. 37(h) of the Dangerous Drugs Act.

(a) *Section 37(h)*

Section 37(h) provides as follows:

> if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being;

As the drugs in the present case were not found concealed in any compartment which had been specifically constructed to conceal the drugs, quite clearly s. 37(h) is not applicable in the present case: see generally the case *PP v. Lin Lian Chen* [1993] 1 SCR 159.

(b) *Section 37(d)*

Section 37(d) provides as follows:

> Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

Section 37(d) is applicable whenever a person is found to have in his custody or control anything containing dangerous drugs. This section envisages by the use of the word "anything" that the drugs were contained in a container or receptacle. Once it is established by the prosecution that the accused had in his custody or control the container containing the drugs, the accused is deemed to be in possession of the drugs. In such a case, there is no need for the prosecution to go any further to prove knowledge of the drugs on the part of the accused. Though knowledge is an essential ingredient of the offence of possession, the need to establish knowledge as a separate ingredient is dispensed with by the fact that the prosecution by establishing custody or control has activated the presumption of possession. Implicit in the accused having possession, is that the element of knowledge of the drugs by the accused is also presumed, for without knowledge (presumed) there cannot be possession. In other words, once the presumption has been activated, the accused is deemed to have possession, and as he is deemed to have possession, he is

also deemed to have knowledge: see however the views of Wilson J in *Choo Teck Soon v. PP* [1954] MLJ 63 where a different approach was taken as the wording in the then legislation was different.

It is sometimes said that knowledge, in such circumstances is presumed under the last limb of s. 37(d), that is, by the words "he is deemed to have known the nature of the drugs". This appears to be a mis-interpretation of the section as these words merely dispense with the need for the prosecution to establish that the accused knew the exact **nature** or **quality** of the drugs: see *Lockyer v. Gibb* [1966] 2 All ER 653 at p. 656 CA and as explained in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 HL. It should be noted that it is for this reason that the last limb of s. 37(d) does not provide by saying that the accused is also deemed to have knowledge of the drugs. To do so would have been superfluous, since the accused is already deemed to have possession, which of course must mean that he is presumed to have knowledge.

The relevant question in the present case, therefore, is whether the drugs found in the car *(albeit* found in the bag) can be said to have been found in "anything" which the accused had custody and control of. In other words, can it be said that since the drugs were found in the car, the car falls within the word "anything" in s. 37(d).

There is now clear authority to establish the principle of law that s. 37(d) does not apply merely because the drugs are found in a car, or for that matter in any vehicle. Thomson J in *Tong Peng Hong v. PP* [1955] MLJ 232 held that in cases where drugs are found in a vehicle, the statutory presumption contained in s. 37(d) could not arise as the vehicle in which the drugs were found did not fall within the words "anything whatsoever containing any dangerous drugs". This proposition of law enunciated by Thomson J was approved by the Supreme Court in the recent case of *PP v. Lin Lian Chen* [1993] 1 SCR 159. Edgar Joseph Jr SCJ observed:

> [We] would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232, that a vehicle in which a drug is carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and therefore in such a case, the presumption contained in s. 37(d) does not arise.

Similarly, in the case of *Syed Ali v. PP* [1982] 1 MLJ 132, the Federal Court expressly held that the presumption under s. 37(d) did not apply where opium was found in the car because "the car ... cannot be held to be anything whatsoever within the meaning of paragraph (d)". Salleh Abas FJ said:

> This expression "anything whatsoever" may appear to have a wide import, but its scope and extent is limited by the word "containing" which qualifies it. A car cannot be said to contain drugs nor could it be said to be a container of drugs although opium was found in it. To hold that the car contains drugs would be, in our view, to twist and overstretch the language beyond its common usage.

Therefore, quite clearly it cannot be said that by the mere fact that the accused had custody or control of the car, he is deemed to be in possession of the drugs found in it.

The learned Deputy Public Prosecutor has, however, contended that she was relying on the presumption under s. 37(d), not merely because the drugs were found in the car but because the accused had custody and control of the **bag** containing the drugs found in the car. In this context she submits that the word "anything" in s. 37(d) covers the bag.

Though at the first blush, this argument of the Deputy Public Prosecutor may appear to stretch the meaning of the word "anything" in s. 37(d) and to circumvent the decisions which have held that drugs found in a car cannot fall within s. 37(d), on closer analysis, there appears to be some merit in the argument of the Deputy Public Prosecutor.

The presumption embodied in s. 37(d), as pointed out earlier, is generally referred to as the container or receptacle presumption. The prosecution may rely on this presumption if dangerous drugs are found in a bag, container, box or any other receptacle. The application of this presumption, however, is restricted by the words

of s. 37(d) that the drugs must be found in "anything whatsoever containing" (the drugs) over which a person had custody and control. The more common cases where this presumption has been invoked has been in cases where a person was found physically to be holding something (the container) which contained the drugs: see, for example, *Mohd Radhi v. PP* [1992] 2 SCR 145 SC. Subsequently, however, this has been extended to situations where a container is found in a room or house which the accused has exclusive control of. In such a situation, it is said that the container is in the custody and control of the accused: see for example the recent Supreme Court decisions in *Pang Chee Meng v. PP* [1992] 2 SCR 1: *Choo Chang Teik v. PP* [1992] 1 SCR 475.

The question now to consider is whether it can said that a **bag** found in a vehicle in which the accused was in, is necessarily, in the custody and/or control of the accused. In determining this issue, a distinction has to be drawn between the situation where the accused person is said to have control and custody of the **bag**, as opposed to a situation where he merely has control or custody of a **vehicle** where the drugs were found.

Whether presumption is applicable in cases where drugs contained in a bag are found in a car/vehicle

What then is the position of an accused who is charged for possession when a bag containing drugs is found in a car in which the accused was? Is the position such that following *Tong Peng Hong* and *Syed Ali*, the prosecution would not be able to invoke the presumption under s. 37(d) against the accused.

As this issue has not been expressly dealt with by the Courts in earlier cases, and as there appears to be some confusion in this area of the law, I have taken the opportunity to review, not only the above cases but also others where an accused had been charged for trafficking in drugs for being in possession of drugs found in a car or in any other vehicle. In most of these cases, the drugs, though found in a vehicle were also found in a bag or in some other form of a container, e.g. a sack or a packet.

The starting point for the analysis of these cases is *Tong Peng Hong*. In this case, drugs were found in a small leather bag locked in a box in a lorry. The owner of the lorry who was in the lorry with the driver and attendant was charged, together with the driver and the attendant, for possession of the drugs. The driver and the attendant were acquitted but the lower Court found the owner of the lorry guilty and convicted him. The prosecution in its case against the owner relied on s. 37(d) of the Dangerous Drugs Ordinance, which is in *pari materia* to s. 37(d) of the Dangerous Drugs Act. The President was of the view that s. 37(d) was applicable as he took the view that the lorry fell within the words 'anything whatsoever' in s. 37(d). On appeal, Thomson J considered in detail the scope of s. 37(d), with particular emphasis on the point whether the President was correct in holding that the lorry fell within the word 'anything' in s. 37(d). It should, perhaps be pointed out that the observations of Thomson J are limited to a situation where the **owner** of a vehicle is being charged for possession of drugs found in his vehicle.

Thomson J in this case in holding that the President was wrong in taking the view that the lorry was 'anything' within s. 37(d) drew a distinction between control of the lorry and control of the bag. In pointing out that the lorry was not the container containing the drugs, he said:

> the thing which contained the opium was not the lorry but the **handbag**. [At p. 233].

His Lordship pointed out that just because, the owner of a vehicle was present in the vehicle at the material time, he need not necessarily have control over the bag, though he may have control over the vehicle. He pointed out that the President was wrong in saying:

> that where something is found in a handbag which is being carried on a lorry, the owner of which is on it but not driving it, then the owner is to be presumed to know all the contents of the handbag not because he is

> in control of the bag but because he is the person having the lorry in his custody, or under his control for the time being'.
> [At p. 233].

Thomson J therefore, was of the clear view that a owner of a vehicle does not necessarily have custody of a bag containing drugs found in a vehicle, even if he is in the said vehicle.

The subsequent cases in purporting to rely on Thomson J's view are less clear in drawing this distinction between custody of the vehicle and custody of the bag containing the drugs.

In *PP v. Salleh Saad* [1983] 2 MLJ 164, where drugs were found in two sacks in a car (the keys to which were with the accused) parked outside the accused's house, Syed Agil Barakhbah J held, following *Tong Peng's* case that the presumption was not applicable. His Lordship merely said:

> the motorcar in question is not a container that contained the morphine but the sacks which were used to keep the blocks together are the containers. The presumption, therefore, does not apply.
> [At p. 167].

As to whether the accused had custody of the sacks, this, was not considered by His Lordship.

Similarly, the Federal Court in *Syed Ali v. PP* [1982] 1 MLJ 132 held that where 10 packets of opium were found in the back seat of a car, the presumption was not applicable as the car was not 'anything whatsoever'. Again whether the accused had custody of the packets was not considered by the Court.

These two cases, therefore, only establish the principle that if the prosecution is relying on s. 37(d), it merely cannot rely on the fact that the drugs were found in a vehicle over which the accused had custody or control. Quite clearly, s. 37(d) would not be applicable. However, following Thomson J's observations in *Tong Peng Hong*, it would appear that if the prosecution wishes to rely on the presumption, the prosecution has first to prove control or custody by the accused not of the vehicle but of the **container** found in a vehicle containing drugs. The fact that the accused had control and custody of the car may, in certain situations assist the prosecution in proving control and custody of the **container**, but mere control and custody of the vehicle by itself is insufficient.

I have also considered some of the other cases where a vehicle was involved. In *PP v. Arjan Singh* [1989] 1 CLJ 462, a passenger was found in a taxi with a bag containing drugs. The passenger was acquitted as there was no proof that he knew what was in the bag which he said he was holding for a friend. The presumption under s. 37(d) was not relied upon by the prosecution in this case.

In *PP v. Lin Lian Chen* [1991] 1 MLJ 316 HC; [1993] 1 SCR 159 SC, the accused was arrested whilst driving a car in which was found a bag containing drugs by the police. Before the Supreme Court it was argued by the prosecution that as the accused was the sole occupant of the car at the time, and even though the car did not belong to him, he was in custody or had under his control the drugs recovered from the car. It would appear that as not all of the drugs found in the car were contained in the plastic bag, the prosecution quite clearly did not rely on custody and control of the bag by the accused. The Supreme Court following *Tong Peng Hong's* case pointed out that as the vehicle was not 'anything' containing any dangerous drugs, the presumption under s. 37(d) did not arise.

In *PP v. Kang Ho Soh* [1991] 3 CLJ 2914, a big, red shopping bag was found in the boot of a car driven by the accused. The bag contained heroin. The car, however, did not belong to the accused. Though there is some reference to the application of s. 37(d), it would appear from the judgment of the Court that the presumption was not relied upon to establish custody and control of the bag. The Court, held on the evidence that as the prosecution had not discharged 'the required standard of proof', the accused ought to be acquitted.

In *Shamsuddin & Anor v. PP* [1992] 1 SCR 494, the appellants (husband and wife) were jointly charged for trafficking in

drugs. The case for the prosecution was that the police who were following the car in which the appellants were, saw a bundle containing drugs being thrown out of the car. It was contended by the prosecution that the presumption under s. 37(d) arose from the fact that the drugs were thrown out of the car which was occupied by the appellants. The Supreme Court in rejecting this argument held:

> In our view, this fact alone is insufficient in this instance to establish control or custody. It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.
> [per Harun Hashim SCJ at p. 498]

The Supreme Court therefore held that as no evidence of custody or control of the bundle containing the drugs was established, the presumption did not arise.

In another Supreme Court decision, *Abdullah Yaacob v. PP* [1991] 2 MLJ 237, a package containing drugs was found in a car driven by the accused. He was charged and convicted. On appeal to the Supreme Court, Hashim Yeop Sani CJ, held, *inter alia* that as from the evidence there was a probability of another person being also present in the car, the trial Judge's failure to consider this evidence was a serious failure which had resulted in a miscarriage of justice to the appellant. The conviction and sentence was accordingly set aside. From the report of the judgment, it is unclear whether the prosecution relied on s. 37(d) in this case. There is no mention of it in the judgment of the Supreme Court.

From an analysis of these decided cases, the following conclusions may be reached:

(a) If drugs are found in a vehicle, the prosecution cannot rely on s. 37(d) by merely establishing that the accused had control or custody of the vehicle: *Tong Peng Hong, Syed Ali* and *PP v. Lin Lian Chan*.

(b) No earlier reported decision has been drawn to the attention of this Court where the prosecution had succeeded in relying on the presumption by establishing that the accused had custody or control of a bag or any other container containing drugs found in a car or any other vehicle.

Though Thomson J in *Tong Peng Hong* drew a distinction between the lorry being considered the thing containing the drugs on the one hand, and the bag containing the drugs on the other, thereby suggesting that it is important for the prosecution to show that the accused had custody and control of the bag and not the vehicle, his Lordship in that case held that the presumption was not applicable to the bag. He observed:

> the thing which contains the opium was not the lorry but **the handbag to which, of course, by itself the statutory presumption had no application.**
> [Emphasis added at p. 233].

It would, however, appear that in that case the prosecution was unable to establish custody and control of the bag by the owner, as besides the owner, the driver and the attendant were also in the lorry: see discussion below.

(c) In some cases, the presumption was held to be inapplicable whenever the evidence indicated that there was more than one person in the car at the time when the drugs were found in the car, *albeit* in a container. In such cases, the presumption under s. 37(d) was held to be inapplicable without any distinction being drawn between custody and control of the vehicle as opposed to custody and control of the container. Furthermore, in such circumstances, the fact that the owner of the vehicle was in the vehicle or was driving it was considered not material in deciding whether the presumption was applicable.

In *Tong Peng Hong*, as pointed out earlier, besides the owner of the lorry, the driver and attendant were also in the lorry at the material time. Similarly, in *Shamsuddin's* case: see passage quoted above.

It would appear that it was for the same reason that the prosecution was unable to rely on the presumption to establish control and custody of the bag or packet in *Abdullah Yaacob* above and *Syed Ali*.

Those cases may be explained on the ground that in all these cases, there were other persons, besides the accused in the vehicle, or there was the probability that there were others in the vehicle at the material time.

However, as to why the prosecution did not rely on the presumption in *PP v. Arjan Singh* [1991] 1 CLJ 462 where the accused who was a passenger in a taxi admitted that the bag found to contain drugs was being looked after by him is unclear.

(d) Where drugs are found in a vehicle and if the prosecution cannot establish conclusively that the accused had control and custody of the **container** containing the drugs, the prosecution must establish possession by direct or circumstantial evidence. Again to quote Thomson J in *Tong Peng Hong*:

> I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disprove or explanation lead the court to the conclusion, quite **independently of any statutory presumption**, that it was in the possession of the person in control of the vehicle.
>
> [Emphasis added at p. 234].

This dictum was quoted with approval by Shankar J in *PP v. Kang Ho Soh* [1991] 3 CLJ 2914, 2920, where His Lordship added:

> Those cases [*Tong Peng Hong* and *Syed Ali*] do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it.

Therefore, from the summary above, it appears to me on a fair interpretation of the section, that in certain circumstances a bag may fall within the scope of the word "anything" in s. 37(d), even though it would lead to the anomalous situation where the presumption would not apply if the drugs were found just lying in the car without being contained in a bag. But it must be emphasised that for the presumption under s. 37(d) to apply, the prosecution must first prove that the accused had exclusive custody or control of the **bag**. The presence of a bag in a vehicle, without any other evidence is insufficient to establish conclusively that the bag was in the custody and/or control of the person present in the vehicle.

Whether presumption is applicable in the present case

Therefore, it is now relevant to consider whether, in the present case, the accused had custody and/or control of the bag found in the car? The prosecution has established that the car was registered in the name of the accused and that the accused was seen driving the car and alighting from it. These facts alone are insufficient to establish conclusively that the accused had control or custody of the bag. However, by the accused's own admission, which I accept, he said that he was aware of the bag in the car. He said in evidence that Johor Seng had left the bag on the floor of the front passenger seat when they arrived at the Mirama Hotel. Johor Seng had told him that he would be back in a short while to collect the bag. Quite clearly, therefore, the accused was having custody, if not control of the bag, even though momentarily. The accused, by his assent in allowing Johor Seng to leave the bag in the car, can be said to have had custody of the bag. That being the case, the presumption under s. 37(d) must apply against him.

I, therefore, hold that the prosecution has succeeded in establishing that the presumption under s. 37(d) is applicable in this case insofar as the accused had custody of the bag - the bag being "anything" within s. 37(d). Such being the case, the accused is also deemed under s. 37(d) to have knowledge of the drugs in the bag and hence to have possession of the drugs. Further by the application of s. 37(da) he is deemed to be trafficking in the said drugs.

I, therefore, now move on to determine whether these presumptions have been rebutted by the defence.

Rebuttal of the presumption

Taking the view that the presumption under s. 37(d) is applicable, has then the defence adduced sufficient evidence to rebut this presumption. It has to be borne in mind that custody and knowledge are both essential ingredients of the offence

of possession. The prosecution has by evidence established custody by the accused. Knowledge, however, of the drugs by the accused has only been presumed 'until the contrary is proved' by the application of the presumption. Therefore, if the accused succeeds in disproving the presumed fact of knowledge by rebutting the presumption of knowledge of the drugs in the bag, the presumption of possession would have been rebutted.

The burden of proof on the accused when discharging his duty to rebut this presumption is now well established by several leading authorities. The English case of *R v. Carr-Briant* [1943] 29 Cr App R 76 is the source of this well established principle of law. This principle of law has been reaffirmed in many cases and has been applied by the Malaysian Courts consistently: see observation of Abdul Hamid LP in the Supreme Court decision in the case of *Pang Chee Meng v. PP* [1992] 2 SCR 1.

In the Supreme Court decision of *Mohamad Radhi v. PP* [1992] 2 SCR 145, Mohd Azmi SCJ observed at page 151:

> In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

Similarly, the Privy Council in *PP v. Yuvaraj* [1969] 2 MLJ 89, on appeal from Malaysia observed that where a statute creating an offence expressly provided that if other facts were proved, (in the present case, custody and control of the bag) a particular fact (e.g. knowledge of the drugs), the existence of which was a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved", the test to be applied in 'disproving' the presumed fact is the same as that applied in civil proceedings, that is, the balance of probabilities.

In the light of the above principles of law, the facts of the instant case have now to be examined. The accused, who elected to give evidence on oath said that he had no knowledge whatsoever as to the contents of the bag, least of all that they contained drugs. He said in evidence that he merely agreed to give Johor Seng a lift to Mirama Hotel. Though he saw Johor Seng carry a bag, Johor Seng did not tell him what was in the bag. When he and Johor Seng arrived at the Mirama Hotel, Johor Seng took the bag from the boot of the car and placed it on the floor of the front passenger seat. At no time did he check the bag to see what were its contents. It was whilst waiting for Johor Seng to return that he was apprehended by the police. At this moment of time he was outside the car. The bag was still in the same place in the car as where Johor Seng had left it.

This was the brief explanation of the accused. Throughout the trial he maintained this stand, that is, he did not know what was in the bag. Even under cross-examination, he withstood the rigorous examination by the Deputy Public Prosecutor and did not falter with his explanation. Furthermore, the defence witness, DW2, Low Teck Chuan, who was at the accused's mee stall when Johor Seng came to ask the accused to lend him the car, confirmed the explanation given by the accused. This Court, had no reason to disbelieve what was stated by Low Teck Chuan.

As can be seen, the defence story is very brief. Yet in its brevity, there was nothing improbable about it. There was no other evidence to contradict or disprove the accused's explanation that he had no knowledge of the drugs in the bag. Whilst it is true that whenever the presumption under s. 37(d) is applicable, the prosecution need not adduce direct evidence of knowledge of the drugs on the part of the accused, yet in the absence of any such evidence, the Court is inclined to accept the accused's sworn testimony unless there are compelling reasons as to why it should not: see generally the observations of Lim Beng Choon J in *PP v. Badrulsham* [1988] 2 MLJ 585. Furthermore, this Court had earlier accepted the evidence of the accused in holding that it was because he

was looking after the bag for Johor Seng, that he is said to have custody of the bag. If this evidence of the accused was accepted by the Court to establish custody of the bag, then the very same evidence cannot be rejected by this Court merely because it is now in favour of the accused.

It may, however, be said that there are two factors which the Court should consider before accepting the accused's explanation:

(i) the existence of Johor Seng, and
(ii) the accused's attempt to run away when confronted by the police.

On the first point, the evidence strongly suggests that there was such a person called Johor Seng - probably a police informer. Johor Seng's name was mentioned by the accused to the police, and ASP Othman admitted in evidence that the accused did tell him that the bag belonged to Johor Seng. Throughout the trial, the accused gave a detailed description of Johor Seng. This was further corroborated by the defence witness, Low Teck Chuan (DW2).

Furthermore, considering the manner in which the police operation was conducted that day, it appears that there is a strong likelihood that there was a second person in the car with the accused. The arrest of the accused on that particular date was a planned exercise as a result of prior information. The police were therefore fully prepared for the operation both in terms of police personnel as well as police vehicles. The police even knew the exact route the accused was to take that date. The police, therefore could, if they so desired, have planned the operation in such a manner that on seeing the accused drive the car, stopped him and apprehended him then and there. They could alternatively have planned it in such a manner that the accused was arrested when the accused stopped the car at the car park and before he alighted from the car. But for some reason the police chose not to follow such a plan.

As it is, there is no evidence to show that the accused was seen handling or carrying the bag. Furthermore, the accused was not apprehended by the police whilst he was still actually in the car with the bag inside it. Again as stated earlier, the mere fact that drugs were found in a car driven by a person, or in a car which is registered in the name of the person driving the car is insufficient. It should be pointed out that there is no specific presumption under the Dangerous Drugs Act to cover such situations. Therefore, it appears that quite obviously, the police did not wish to apprehend the accused when the other person (probably Johor Seng) was still in the car with the accused. Hence, they waited until Johor Seng had left before they apprehended the accused.

It should further be pointed out that at no stage did the police examine the bag or the drugs for fingerprints or nail clippings of the accused. The importance of so doing has been explained by the Courts in many cases dealing with drug trafficking: see for example, the observations of Edgar Joseph Jr. J (as he then was) in *PP v. Heinrich* [1988] 2 MLJ 594 and Gunn Chit Tuan J (as he then was) in *PP v. Lim Ah Bek* [1989] 2 CLJ 1090. See also Edgar Joseph Jr SCJ's observations in the recent Supreme Court decision of *PP v. Lin Lian Chen* [1993] 1 SCR 159, at p. 165.

In any case, even if it is conceded that there was no such person as Johor Seng, as I have said earlier, there was no evidence to the contrary (even though the prosecution need not strictly adduce such evidence) before the Court to show that the accused did have knowledge of the drugs. None of the prosecution witnesses gave evidence to show that the accused had knowledge of the drugs. Therefore, the explanation of the accused that he had no knowledge remains uncontradicted and becomes even more probable.

On the accused's attempt to run away when confronted by the police, the accused has given the explanation that he thought the police were after him in connection with his illegal moneylending business. Though, generally the fact of the accused running away from the police will be taken into consideration in determining the guilt of the accused, it must be stressed that no strong inference can be

placed on the mere fact that an accused attempted to run away when confronted by a group of police personnel. In this regard, the caution stated by the Supreme Court in *Choo Chang Teck v. PP* [1992] 1 SCR 475 should be borne in mind. The Supreme Court said at p. 481:

> We feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone was not sufficient to base a conviction of the appellant ...

It therefore appears to this Court that on the balance of probabilities, the accused had no knowledge of the drugs in the bag. He has therefore successfully rebutted the presumption of possession and hence trafficking under ss. 37(d) and (da) of the Dangerous Drugs Act.

In view of the above finding, and as this Court has not placed too much weight on the evidence of ASP Othman (SP3) or Inspector Ahmad Nordin (SP4), specially as to the making of the cautioned statement (which was alleged by the defence to have been fabricated), there is no necessity for this Court to make any finding on the credibility of these witnesses. This Court, therefore, makes no finding on the evidence of Dr. Ganesan who was brought in as an expert witness by the defence to establish that the signature of the accused on the cautioned statement was forged.

Similarly, this Court also makes no findings on the question as to whether the accused did carry out the business of illegal moneylending (being a loan shark).

Conclusion

As I have stated earlier, on the evidence as a whole, this Court is satisfied that the defence raised by the accused is reasonable and probable and sufficient to rebut the presumptions under the Dangerous Drugs Act. I, therefore, hold that the presumptions under ss. 37(d) and (da) of the Act which I had invoked at the close of the prosecution's case, have on the balance of probability been rebutted.

I, therefore, acquit and discharge the accused.

I direct that all exhibits be released to the police for disposal after the expiry of the appealable period, if there is no appeal.

Postscript:

This judgment was originally fixed to be delivered on 14 December 1992. However, just before this date, the fire which destroyed the building housing the Criminal Courts also resulted in the destruction of the computer and the already prepared written judgment. As a consequence, this judgment had to be rewritten and retyped. Hence, the delay in the delivery of this judgment.